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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Ukraine

Note by the Secretariat

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination conducted an official visit to Ukraine from 14 to 18 March 2016. The visit examined the situation in the country with respect to the activities of mercenaries, to mercenary-related activities involving foreign fighters, and to private military and security companies. The Working Group's monitoring on foreign fighters forms part of its ongoing study to assess any possible linkages between the foreign fighter phenomenon and mercenarism, and the impact on human rights.

The report presents the main findings of the Working Group and focuses on definition and scope as regards mercenaries and foreign fighters, as well as on motivational factors and recruitment. Particular attention is given to the proliferation of foreign armed actors in the context of ongoing conflict in the country. The report also covers the various measures taken by the Government of Ukraine to address these issues. The Working Group provides recommendations to all parties to the conflict and to the Government, with a view to full respect, protection and fulfilment of human rights.

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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Ukraine*

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* Circulated in the language of submission only.

I. Introduction

1. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited Ukraine from 14 to 18 March 2016, at the invitation of the Government. The delegation comprised the Chair and Rapporteur of the Working Group, Patricia Arias, and Working Group member Saeed Mokbil, as well as staff of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva and interpreters.

2. The Working Group wishes to thank the Government of Ukraine for its cooperation. It also expresses its appreciation to the human rights monitoring mission in Ukraine for the excellent support in organizing and facilitating the visit.

3. Pursuant to Commission on Human Rights resolution 2005/2, Human Rights Council resolution 30/6 and General Assembly resolution 70/142, the Working Group is mandated to monitor mercenaries and mercenary-related activities in all their forms and manifestations globally. The mandate also includes the monitoring of the activities of private companies that offer military assistance, consultancy and security services on the international market, and of the effects of those services on the enjoyment of human rights, particularly the right to self-determination.

4. In 2014, the Working Group decided to explore the growing phenomenon of foreign fighters, in order to assess any possible linkages with mercenarism as well as the impacts on human rights and the right of peoples to self-determination. The Working Group conducted a year-long study that included a series of expert meetings, panel events, and extensive research on the subject of foreign fighters in order to prepare its 2015 report to the General Assembly (A/70/330). In that context, official visits were undertaken to Tunisia in July 2015 (see A/HRC/33/43/Add.1) and to Belgium in October 2015 (see A/HRC/33/43/Add.2) as part of the efforts to gather concrete information for the report to the General Assembly.

5. During the visit to Ukraine, the Working Group was able to hold meetings in Kyiv with various representatives of the executive, legislative and judicial branches of the State. It held meetings with representatives of the Ministry of Justice, the Ministry of Defence, the Security Service of Ukraine, the Ministry of Internal Affairs, the Parliamentary Committee on National Security and Defence, the Ombudsperson's Office, the High Specialized Court for Civil and Criminal Cases and the Prosecutor-General's Office. The Working Group was grateful for the opportunity to meet with members of the diplomatic community and civil society and with representatives from various United Nations offices and agencies.

6. The Working Group was able to visit Donetsk and meet with representatives of the self-proclaimed "Donetsk people's republic", including the "assistant head of the people's council", a representative of the "office of the ombudsperson", the "deputy commander-in-chief of the armed forces", a representative of the "prosecutor's office" and the "head of the accreditation of foreign representatives".

7. Although it received some information concerning the Autonomous Republic of Crimea, the status of which is determined in General Assembly resolution 68/262, the Working Group did not conduct a visit to the territory.

II. Background and context

8. The human rights crisis in Ukraine began in November 2013, when mass protests took place in Kyiv due to the announcement by the Government that it would not sign the Association Agreement with the European Union. The protests, which began in Maidan

Nezalezhnosti (Independence Square) in the capital, spread to other parts of the country, and by mid-February 2014 had escalated into violent clashes between riot police and other security forces and protesters. The protests resulted in over a hundred deaths, mostly due to the use of firearms by government security personnel against demonstrators.[1]

9. After President Yanukovych left Ukraine, on 22 February 2014, Parliament stated that he had withdrawn from performing constitutional duties, and decided to hold presidential elections on 25 May 2014. In the meantime, on 26 February 2014, a new interim Government was formed. Starting from 24 February 2014, armed men in military uniforms without insignia, allegedly from the Russian armed forces and allied local paramilitary groups, began gradually taking over strategic infrastructure in the Autonomous Republic of Crimea. They established de facto authorities and assisted them in calling for a "referendum" in which the local population had to choose between "reunification" with the Russian Federation or remaining a part of Ukraine.[2] The General Assembly, in its resolution 68/262 of 27 March 2014, underscored that the referendum held on 16 March 2014 had no validity and could not form the basis for any alteration of the status of the Autonomous Republic of Crimea. It also affirmed its commitment to the sovereignty and territorial integrity of Ukraine within its internationally recognized borders.

10. In April and May 2014, anti-Maidan and pro-federalism supporters started to seize government buildings in a number of towns and cities in Donetsk and Luhansk regions. In early May 2014, the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic" were proclaimed after "referendums" that were not recognized either by the Government of Ukraine or by the international community. In late May 2014, Petro Poroshenko won the elections and became the new President of the country, amidst reports that people in eastern regions under the control of armed groups had been prevented from voting in the elections. The formal launching of military action by the Ukrainian authorities ("anti-terrorist operation") on 14 April 2014 and the reported influx of fighters, weapons and ammunition from the Russian Federation into certain districts of Donetsk and Luhansk regions resulted in an armed conflict that reached its peak in July and August 2014, with numerous civilian casualties, caused mainly by indiscriminate shelling of populated areas. On 17 July 2014, Malaysia Airlines flight MH17 was shot down when flying over the territory controlled by armed groups in Donetsk region. The crash of the aircraft resulted in 298 deaths and prompted worldwide condemnation.

Minsk Protocol

11. The worsening of the conflict in Ukraine led to the signing on 5 September 2014 of a first ceasefire agreement, known as the Protocol on the results of consultations of the Trilateral Contact Group (Minsk Protocol). The agreement was negotiated by representatives of Ukraine, the Russian Federation and the armed groups, under the overall facilitation of the Organization for Security and Cooperation in Europe (OSCE), which had been tasked with overseeing and assisting with the negotiation of the agreement, and its implementation.

12. The Minsk Protocol contained 12 provisions which were aimed at ensuring an immediate ceasefire, decentralization of power, the immediate release of all hostages and illegally detained persons, the continuation of inclusive national dialogues, and the implementation of measures to improve the humanitarian situation in the Donbas region in

[1] See the OHCHR report on the human rights situation in Ukraine, 15 April 2014, para. 2. Available from www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx.

[2] Ibid., paras. 18 and 19.

the east. Of interest to the Working Group was a provision calling for the withdrawal of illegal armed formations and military equipment, as well as fighters and mercenaries, from Ukraine.

13. An accompanying document known as the Memorandum outlining the parameters for the implementation of commitments of the Minsk Protocol (Minsk Memorandum), signed on 19 September 2014, clarified the conditions of the Minsk Protocol and further reiterated the need for a withdrawal of fighters and mercenaries from the conflict zone under the supervision of OSCE. However, due to ceasefire violations, the conflict continued to worsen, thus challenging the effectiveness of the Minsk Protocol to provide lasting resolution to the conflict.

14. On 12 February 2015, amidst the new escalation of hostilities in the area of Donetsk International Airport and near the town of Debaltseve, what came to be known as Minsk II was signed, stipulating further measures. Minsk II, inter alia, retained the provisions on the withdrawal of all foreign armed formations and mercenaries from the territory of Ukraine, under the supervision of OSCE, as well the withdrawal of heavy weapons by both sides to the conflict and the creation of a security zone.

15. During the Working Group's visit, there were ongoing, though reduced, hostilities in the east of the country, as is reported by the human rights monitoring mission in Ukraine.[3] As also noted in that report, OSCE observed systematic violations of the ceasefire, mainly in a number of hotspots along the contact line. With a relative decrease in the shelling of populated areas and lower levels of civilian casualties, explosive remnants of war and improvised explosive devices were the main causes of civilian casualties in the conflict zone. In addition, Ukrainian armed forces continued to position themselves near towns and villages while armed groups embedded themselves more deeply into residential areas, further endangering the local population. The risk of re-escalation of hostilities therefore remained high. The conflict continued to cause casualties. The conservative estimate by OHCHR covering the period from the beginning of the conflict in mid-April 2014 until 15 May 2016 is of 30,903 conflict-related casualties in eastern Ukraine, among civilians, Ukrainian armed forces and members of armed groups; this included 9,371 people killed and 21,532 people injured.[4]

16. The adverse impacts of the conflict significantly affected people residing in the conflict zone and all their human rights. The Working Group, when travelling to Donetsk, observed first-hand the dire situation of those living along the contact line and the extreme difficulty for individuals to move freely between the territories controlled by the Government and the territory under the control of the self-proclaimed "Donetsk people's republic".

III. Definition and scope

17. In international law, the recruitment and use of mercenaries is covered by the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and by the International

[3] See the thirteenth OHCHR report on the human rights situation in Ukraine, covering the period from 16 November 2015 to 15 February 2016. Available from www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf.

[4] See the fourteenth OHCHR report on the human rights situation in Ukraine, covering the period from 16 February to 15 May 2016, para. 23. Available from www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf.

Convention against the Recruitment, Use, Financing and Training of Mercenaries, to which Ukraine is a party. A mercenary is defined in Protocol I as someone who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) Is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a party to the conflict; and

(f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

18. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries stipulates that the recruitment, use, financing or training of mercenaries is an offence, and prohibits States parties from engaging in such activities. It provides a similar definition of mercenary to that in Protocol I, but adds that a mercenary is someone who:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation.

19. Regarding foreign fighters, there is no internationally agreed legal definition for this phenomenon, nor a specific regime governing them. Foreign fighters are generally understood to be individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology, but can also be attracted to fighting for financial reward. Foreign fighters are obliged to respect the applicable rules of international human rights law and international humanitarian law during armed conflicts.

20. Though there are similarities in the definitions of a mercenary and a foreign fighter, the latter may also include nationals of a party to the conflict, for example a member of the diaspora who returns to join the conflict. A mercenary cannot be either a national of a party to the conflict or a resident of a territory controlled by a party to the conflict. Similarly, foreign fighters, although they may or may not be nationals of a party to the conflict, do not reside in the State affected by the conflict and have travelled from abroad to join the conflict.

21. With regard to the conflict in Ukraine, the Working Group does not make any determination as to whether the conflict is internal or international in character, as it considers this to be beyond the scope of its mandate.

IV. Proliferation of foreign armed actors in the conflict

22. The participation of foreign armed actors in the conflict in Ukraine is an established fact that neither the Government nor the armed groups deny. The declaration of the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic" not only precipitated the escalation of the conflict in certain districts of Donetsk and Luhansk regions, but also prompted these fighters to come from abroad. The exact number of foreign fighters who have taken part in the conflict is difficult to estimate. In June 2014, research undertaken by the Ukrainian Centre for Economic and Political Studies estimated their number at 5,000, which included "Kadyrov fighters from Chechnya, Cossacks, mercenaries, and members of Crimean Alpha and Berkut units". The Working Group was informed by the Ukrainian authorities of large numbers of fighters from the Russian Federation serving in armed groups of the self-proclaimed "Donetsk people's republic" or the self-proclaimed "Luhansk people's republic". According to Ukrainian officials, about 8,000 of an estimated 42,000 fighters were alleged to be from the Russian Federation.

23. The Working Group was informed that foreign armed actors also came from various countries, mostly in Europe, to join both the armed groups of the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic", and volunteer battalions on the side of the Government.

24. With regard to the volunteer battalions fighting for the Government, the Working Group was informed that while some foreigners had clearly travelled to Ukraine to support the Government in the conflict, other foreigners who had joined the volunteer battalions were already residing in the country before the outbreak of the conflict. Their presence in the country was for various reasons, such as the desire to reside with family and relatives. Some of these foreigners did not have passports or were considered to be stateless, and had thus remained in the country. Other foreigners had come to Ukraine when it was still a part of the Union of Soviet Socialist Republics but had never acquired citizenship after Ukraine declared its independence.

25. The explanation received from the government authorities regarding the establishment of the volunteer battalions was that when the conflict broke out in the country, the available military forces were not sufficient to combat the growing number of fighters in armed groups in the eastern part of the country. To support its military operations, volunteer formations were established under the auspices of the Ministry of Defence and the Ministry of the Interior, specifically the National Guard of Ukraine, which citizens of Ukraine, foreign nationals and stateless persons joined. Over 30 territorial defence battalions were created by the Ministry of Defence. The Working Group was informed that in order to join a battalion, volunteers had to undergo a medical examination, register as reserve military servicemen and prove that they did not have any criminal record.

26. The Working Group was informed by the authorities that volunteer battalions, though partially composed of foreigners, could not be considered as mercenaries as most members had joined to support the country against what was deemed as aggression fuelled by the Russian Federation. Financial gain was reportedly not the primary incentive for fighting, as many volunteers had had to purchase their own food, uniform and protective equipment due to the State's lack of resources and inability to provide these items during the conflict.

27. In its discussions with the Security Service of Ukraine, the Working Group was informed of at least 176 foreigners serving in certain districts of Donetsk and Luhansk regions, under the control of armed groups, whose identities had been established and who

were from 26 countries, including Belarus, France, Georgia, Germany, Italy, Kazakhstan, Latvia, Poland, Serbia and Spain. Many of these reportedly fought in what is known as the "fifteenth international brigade".

28. During the meeting with the representatives of the self-proclaimed "Donetsk people's republic", the Working Group was informed that there were currently 50 "internationalists" serving in its armed groups, whose conditions of service, including accommodation, food and payments, were the same as those of their local counterparts. There was no criterion for a particular nationality to be able to serve in the armed group.

29. Some information shared with the Working Group indicated that groups of fighters, including foreigners, had also been recruited with the financing and support of wealthy individuals. One such battalion was known as "Dnipro-1", composed mostly of Ukrainian citizens and reportedly financed by the then head of the Dnipropetrovsk regional state administration.

30. During the visit, the Working Group requested both to the Government and to the representatives of the self-proclaimed "Donetsk people's republic" to meet with foreign fighters in their custody, but was regrettably unable to do so. The Working Group was also unable to meet with foreign fighters detained by the Government of Ukraine.

31. In response to its request to meet foreign detainees, the Working Group was informed by the Security Service of Ukraine that as part of the provisions of the Minsk Protocol, many prisoner exchanges had taken place between the two parties and there was no one available to meet with the delegation. The Working Group also notes that it is generally very difficult to meet with detainees under the control of the self-proclaimed "Donetsk people's republic" and it was informed by representatives of the latter that there were no foreign fighter detainees in custody when the representatives met with the visiting delegation.

32. While the Working Group did not visit the Autonomous Republic of Crimea, it received reports, including from civil society actors, that the events there in March 2014 were conducted by combined forces comprising regular Russian Federation troops, alleged mercenaries recruited from traditional Cossack paramilitary fighters, and general volunteers.

V. Motivational factors

33. The motivations of foreigners joining the armed conflict in Ukraine reportedly vary. Regular career military persons represented a significant number of the participants. The Working Group was told that many were inspired to fight for ideological or political reasons, and others for financial compensation. In addition, some foreigners were from a criminal background, and information shared also indicates that some convicts in the Russian Federation were offered the option of imprisonment or serving in the conflict.

34. The Working Group received data that foreign women have also been among the combatants in the armed conflict, although in much smaller numbers. For example, they numbered 3 out of the 176 foreign fighters identified by Ukrainian authorities as fighting in the east.

35. Of the 176 foreign fighters identified, Ukrainian authorities estimate that some 70 per cent were motivated primarily by financial gains, and the remaining 30 per cent by a combination of both financial and political reasons, including as members of their respective country's rightist or leftist organizations.

36. In particular, it is alleged that those who were politically motivated were strongly influenced by propaganda. Others, such as those from Spain, were reminded of when the Union of Soviet Socialist Republics took part in the Spanish Civil War and were asked to pay back that historical debt. Yet others, such as the Chechens, reportedly undertook a proxy war of sorts, fighting on both sides of the conflict.

37. There was no information on foreign fighters joining battalions in Ukraine solely for compensation, and volunteers were largely deemed to be fighting for ideological reasons.

38. However, it was reported that some local people had joined the armed groups because there were limited alternatives for earning an income. Many former miners and factory workers joined the combat as more and more factories closed.

39. At the beginning of the hostilities, the conflict was allegedly also known as the "holiday war", as a way to earn money and have fun, and fighters were known as "vacationists".

40. Reportedly, fighters may also be awarded a diploma from the self-proclaimed "Donetsk people's republic" for bringing order to the "republic". They may also be awarded a medal for heroic acts.

41. While salaries were reported to be ad hoc in the early period of the conflict, it was learned that structured salaries had come into existence after some months, around October 2014 when "armed forces of the republics" were being established in certain districts of Donetsk and Luhansk regions, for example under the auspices of the "ministry of defence" of the self-proclaimed "Donetsk people's republic". Salaries were in the range of $300 to $500 per month, depending on rank, unit and duties. Reports indicate that company commanders may be paid $477 per month, commanders of small units $439 per month and privates $419 per month.

42. Alleged mercenaries were reportedly paid higher salaries and formed closed, separate units. They were reportedly more highly skilled, including as snipers.

43. The Working Group was told that some fighters, notably members of the Government's volunteer battalions, had purchased their own equipment, such as night goggles, uniforms and food, in order to join the fight. It was also reported that funding for volunteers had also been undertaken by ordinary citizens. However, funding for foreign fighters in the territories controlled by armed groups in the east had allegedly been largely attributed to financial support from the Russian Federation.

VI. Recruitment

44. The Working Group learned that much of the recruitment of foreigners into various armed groups was undertaken through social media and other online communications, where information on the conflict as well as contact information for follow-up enlistment was readily available. Recruiting offices, allegedly including offices in the Russian Federation, allowed for face-to-face sharing of information and processing of recruits.

45. Broader recruitment was allegedly also undertaken through civil "patriotic" organizations in the Russian Federation, such as veterans' unions and so-called centres for the recruitment of volunteers.

46. Some armed groups also recruited through enlistment carried out by people who had already taken part in the conflict. It was reported that some fighters had returned home to look for recruits, drawing on youths and on other members of organizations that the fighters belonged to.

47. Recruitment for some armed groups may also involve receiving special training in military camps before deployment. This covers general military training, use and operation of weapons, sniper training, use of mines and explosives, and the organization of protests and riots. The period of training may vary, from five days up to three months, and the training culminates in the awarding of a military certificate. It is alleged that there are more than 100 training camps in the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic", some 29 in the Autonomous Republic of Crimea, and 50 in the Russian Federation. Once recruited, foreign fighters may be given false documents and placed on the front line or be made members of reconnaissance, diversion or intelligence groups.

48. The usual entry to Ukraine for foreign fighters supporting the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic" is reportedly through the 400-km section of the border between the Russian Federation and Ukraine that is controlled by the armed groups. Over the course of the conflict, authorities have noted that some 5,000 young persons have been observed entering at these borders, most of them wearing military-style clothing and backpacks. According to OSCE, men and women in military-style clothing have continued to cross the border daily between Donetsk region (controlled entirely by the armed groups) and the Russian Federation.[5]

49. It is also reported that training of the Ukrainian armed forces is undertaken by military officials of armed forces who have come from abroad, as well as by mercenaries serving as training instructors.

VII. Legislation and measures relating to mercenarism and foreign fighters

50. A series of legislative changes related to mercenarism and foreign fighters were implemented after the conflict began. On 17 March 2015, Parliament drafted Law No. 2389 to allow foreigners to join the Armed Forces of Ukraine. Further amendments were made to the Criminal Code of Ukraine and to the Law on Military Service. Article 447 of the Criminal Code criminalizing mercenarism was amended to align the definition of "mercenary" with that in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The crime of mercenarism is punishable by a term of imprisonment of between 5 and 10 years. The Working Group commends the Government for this initiative.

51. On 6 October 2015, the Parliament of Ukraine adopted the Law on Amending Certain Legislative Acts of Ukraine regarding Foreigners and Stateless Persons Serving in the Armed Forces of Ukraine. The Working Group was informed that the reason for the adoption of the law, as given in the explanatory note to the draft law, was that up to 1,000 foreign fighters were taking part in the armed conflict in eastern Ukraine on the side of the government forces. Their legal status up to that point had been unclear, as the legislation of Ukraine had neither explicitly prohibited, nor allowed for, military service by foreigners and stateless persons in the Ukrainian armed forces. The Working Group was also informed that the law replicated a very similar law adopted in the Russian Federation in 1998, and that such integration of foreign volunteers into the national armed forces was not prohibited in international law. A further justification given for the integration of foreign volunteers

[5] "Weekly update from the OSCE observer mission at Russian checkpoints Gukovo and Donetsk based on information as of 2 February 2016". Available from www.osce.org/om/220211.

was to avoid the risk of these individuals being recruited by wealthy individuals thus forming private armed groups outside of government oversight.

52. The law of 6 October 2015 amended a number of legislative acts in order to allow foreigners and stateless persons to serve in the Armed Forces of Ukraine at the rank of private, sergeant or sergeant-major, on a contract basis only. Such persons are entitled to the same level of remuneration as citizens of Ukraine serving at equal rank on a contract basis, except that their military service does not count towards their pension insurance record as it does for citizens of Ukraine. Foreigners and stateless persons become eligible to serve in the Armed Forces of Ukraine at officer rank only after gaining citizenship of Ukraine.

53. The following legislative acts were amended by the law of 6 October 2015:

- Law on Legal Status of Foreigners and Stateless Persons: Provides that foreigners and stateless persons who undergo contract military service in the Armed Forces of Ukraine are deemed to have lawfully temporarily resided in the territory of Ukraine for the duration of such contract. Their temporary residence may be confirmed by their military service record book.
- Law on Immigration: Adds an additional category for immigration, with the quota to be defined by the Cabinet of Ministers of Ukraine — people who have served in the Armed Forces of Ukraine for three or more years.
- Criminal Code of Ukraine: Brings the definition of "mercenary" into line with a conventional meaning.
- Law on the Internal Service Regulations of the Armed Forces of Ukraine: Adds the text of a military oath to be taken by foreigners and stateless persons admitted to serve with the Armed Forces of Ukraine; adds that foreigners and stateless persons admitted to serve in the Armed Forces of Ukraine shall take the military oath alongside citizens of Ukraine undergoing military service.
- Law on General Military Duty and Military Service: Provides that foreigners and stateless persons who are legally on the territory of Ukraine and match the following criteria: (a) are below 45 years old; (b) have no health constraints; (c) have undergone professional and psychological selection; and (d) have the necessary level of physical aptitude; can undergo military service at the rank of private, sergeant or sergeant-major, on a contract basis only. They shall be entitled to the same level of remuneration as citizens of Ukraine serving at equal rank on a contract basis. Foreigners and stateless persons become eligible to serve in the Armed Forces of Ukraine at officer rank only after gaining citizenship of Ukraine. The General Staff of the Armed Forces of Ukraine shall define which positions in the Armed Forces of Ukraine cannot be occupied by foreigners and stateless persons.
- Law on Social and Legal Protection of Military Servicemen and their Family Members: Clarifies that the period of military service of foreigners and stateless persons in the Armed Forces of Ukraine does not count towards their pension and insurance record.
- Law on the Armed Forces of Ukraine: Provides that foreigners and stateless persons who, according to the law, are enlisted in the Armed Forces of Ukraine for the first time shall officially commit to following the Constitution and the laws of Ukraine and fulfilling their military duties. Military servicemen when on duty shall wear the military uniform.

54. By April 2015, all volunteer battalions had been incorporated into either the Armed Forces of Ukraine or the Ministry of the Interior (National Police and National Guard of Ukraine). Only two armed formations had reportedly not been incorporated, namely the Voluntary Ukrainian Corps "Right Sector" (Dobrovolchyi Ukraiinskyi Korpus "Pravyi Sektor") and Organization of Ukrainian Nationalists battalions. The Working Group was informed that the incorporations had taken place on an individual basis rather than on a battalion basis.

55. On 24 December 2015, Parliament amended the Law on the National Guard of Ukraine, envisaging the possibility for foreigners and stateless persons to serve in the National Guard of Ukraine. It reads, in the relevant part, that "in circumstances envisaged by the Law of Ukraine on General Military Duty and Military Service, foreigners and stateless persons who lawfully reside in the territory of Ukraine may, on a voluntary basis (on contract), undertake military service with the National Guard of Ukraine". However, the Working Group was informed that the formal procedures to implement the new law on foreign volunteers were still being developed.

56. Decree No. 501/2015 of the President of Ukraine, dated 25 August 2015, on the National Human Rights Strategy of Ukraine, identified ensuring the right to life as a strategic area of focus, and stipulated the State's duty to protect human life in view of current circumstances. The Decree identified as being of particular concern, inter alia, "violation of the right to life due to illegal actions of the terrorist organizations 'Donetsk people's republic' and 'Luhansk people's republic', fighters, mercenaries..."

Challenges in identifying and proving mercenarism

57. The distinction between mercenaries and foreign fighters is important in clarifying the situation of foreign armed actors in Ukraine. However, during the visit, the Working Group was unable to gather substantial and concrete data on the profile of fighters who had travelled from abroad to join the conflict, making it difficult to develop a comprehensive picture of the activities of foreigners fighting in the various armed formations.

58. Interlocutors informed the Working Group that although there was strong conviction regarding the presence of mercenaries in the armed conflict, the absence of first-hand information in relation to the specifically defined criteria to denote a mercenary made it difficult to state conclusively whether certain armed actors were mercenaries or simply foreign fighters. Moreover, there were other challenges, which included difficulty in proving the crime of mercenarism. The profit-gaining criterion was often the most difficult to establish, due to the lack of precise information on the income level of members of the armed groups.

59. Despite the lack of concrete data, the Working Group believes that the information it received points to several levels of foreigner engagement. These vary from volunteers to paid servicemen and servicewomen, and from independent militia members to professional members of the military.

60. According to the Security Service of Ukraine, the majority of fighters who were coming in to join the conflict in the east were from the Russian Federation, while small numbers were from other countries. A list of countries with nationals engaged in the hostilities in the east showed fighters from Afghanistan, Armenia, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, Colombia, the Czech Republic, Estonia, France, Georgia, Germany, India, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Poland, the Republic of Moldova, Serbia, Slovakia, Spain, the United States of America and Uzbekistan. It was not clear to the Working Group, however, whether some of these individuals were of Ukrainian origin or part of the diaspora and were returning to participate in the conflict.

61. The Security Service of Ukraine informed the Working Group that most of these fighters from abroad were recruited to operate on the front line and that mercenaries participated in the hostilities in the Mariupol area and in the taking over of Donetsk airport. These alleged mercenaries included former military men as well as a union of veterans, Cossacks and others, who were reportedly associated with the Russian Federation.

62. Camps and training bases located in Donetsk and other parts of the Donetsk region have reportedly been used to facilitate military training, including on the use of snipers, mines and explosives, the organization of protests and mass riots, and related activities. Usually, it is reported that the training lasts three months. Government authorities highlighted the ease with which fighters, ammunition and even fleets of tanks could pass across the border from the neighbouring Russian Federation into Ukraine. Only two border posts between the Russian Federation and Ukraine in Donetsk region were actively monitored by OSCE. However, inspections of the passengers being transported are not permitted, thus restricting the opportunity to gather information on the profile of individuals crossing the borders.

63. Although it received allegations of the recruitment of mercenaries, carried out in particular by the armed groups, the Working Group was not informed of anyone being convicted of mercenarism under the new law. Challenges in obtaining evidence and gathering information concerning alleged mercenaries, particularly in the area controlled by the armed groups in the east, further complicates the judicial proceedings on mercenarism. However, the Working Group learned that ongoing investigations were being carried out by specialized bodies into — among other things — mercenarism, and that no one had yet been indicted and brought to court.

64. In some court cases, there has been mention of "mercenaries" taking part in the armed conflict in eastern Ukraine. For example, the Working Group learned that on 23 December 2015, Poltava District Court, in Poltava region, having heard the criminal case against a Poltava resident for his alleged affiliation with the armed groups, established that one of the members of the armed groups was communicating with the commander of the "Don" battalion of the "Donetsk people's republic", which was allegedly composed of mercenaries from Chechnya and Serbia. The Working Group was informed that on 9 November 2015, the Security Service of Ukraine had reported on the detention of a citizen of the Russian Federation in the government-controlled town of Artemivsk (currently Bakhmut, Donetsk region). The detainee reportedly came from the Ryazan region in the Russian Federation and crossed the border into Ukraine illegally in order to join armed groups of the self-proclaimed "Donetsk people's republic" as a mercenary.

65. Reports received by the Working Group also indicate that on 26 September 2015, the Security Service of Ukraine described a resident of the Donetsk region as being a "mercenary" with the armed groups of the self-proclaimed "Donetsk people's republic", who was sentenced to five years of imprisonment under article 110 of the Criminal Code for trespassing against the territorial integrity of Ukraine. Reportedly, the convicted individual had joined the armed groups in order to earn a profit from carrying out military assignments, and had been promised monetary compensation of Hrv 800 per day. Investigators on the case apparently established that this individual had come through an area in Donetsk region controlled by the armed groups and had been detained in the town of Sviatohirsk (Donetsk region).

66. The Working Group notes that the Government of Ukraine has framed the conflict in the east as largely a problem of terrorism, and its response is mostly executed as part of its anti-terrorism operation. Other charges that have commonly been applied by the authorities against foreign fighters in the custody of the Ukrainian authorities have been brought under articles 110 (trespassing against territorial integrity) and 260 (creation of unlawful paramilitary or armed formations) of the Criminal Code.

67. The Working Group also received information concerning allegations of mercenarism made by representatives of the self-proclaimed "Donetsk people's republic". On 25 January 2016, the so-called "ministry of defence" of the self-proclaimed "Donetsk people's republic" claimed that the presence of foreign mercenaries, who had come to render assistance to the Ukrainian Government forces in the village of Shyrokyne, was a serious concern. Reportedly there were citizens of Poland and Turkey among this group. There were allegations of abduction of women in Mariupol and adjacent residential areas that reportedly took place at the hands of these fighters. Representatives of the self-proclaimed "Donetsk people's republic" also raised concerns in relation to members of the Azov battalion which, according to information received, actively participated in fighting in eastern Ukraine. The group reportedly included fighters from France, Italy, Sweden and the United Kingdom of Great Britain and Northern Ireland and is now integrated into the National Guard of Ukraine.

68. Other information received by the delegation identified Georgians of the alleged "Georgian national legion", which consists of former officers of the Georgian military who took part in the Georgian-Abkhaz conflict of the early 1990s. These men reportedly participate in fighting for battalions such as Kyivska Rus, Donbas, Aidar and Azov, which support the Government.

Prosecution of foreign fighters in home countries

69. The Working Group was informed that, in response to the activity of foreign fighters in the armed conflict, some countries were introducing specific amendments to their laws, including the criminalization of mercenarism, to deal with fighters who had travelled to fight in Ukraine. There are reports that the Spanish authorities arrested Spanish citizens in six locations in Ukraine, charging them with murder and illegal arms transfer. The Working Group learned of one Estonian fighter who had allegedly been extradited.

70. Furthermore, on 27 April 2015, a court in Kazakhstan sentenced a 27-year-old Kazakh citizen for illegal participation in the armed conflict in eastern Ukraine, under article 172 (intentional unlawful participation of a citizen of the Republic of Kazakhstan in the armed conflict or hostilities on the territory of a foreign state without attributes of mercenarism) of the Criminal Code of Kazakhstan. The court has reportedly sentenced him to three years of imprisonment.

71. Additionally, on 7 August 2015, another citizen of Kazakhstan was reportedly sentenced to three years' probation for taking part in the armed conflict in eastern Ukraine, also under article 172 of the Criminal Code. The convicted individual reportedly participated in the "defence" of Luhansk airport. He was wounded shortly afterwards and sent to a Donetsk hospital for treatment. Later he returned home, to Ust-Kamenogorsk, where he was reportedly detained by the authorities.

VIII. Human rights issues

72. At the time of the Working Group's visit, civilians continued to be killed, unlawfully detained, tortured and disappeared in eastern Ukraine and violations of the ceasefire agreement under the Minsk Protocol continued.[6] The presence of a large quantity

[6] OHCHR report on the human rights situation in Ukraine covering the period from 16 November 2015 to 15 February 2016. Available from www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx.

of sophisticated weaponry and significant flows of foreign fighters from the Russian Federation were reported by the human rights monitoring mission in Ukraine as having implications for the human rights situation in eastern Ukraine. Those living within the conflict-affected area were at the gravest risk of violations, including loss of life.

73. On 5 June 2015, the Government of Ukraine notified the Secretary-General of the United Nations of its derogation from certain obligations under the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, based on a declaration of the Parliament of Ukraine.[7]

74. It was stated in the notification that due to the annexation and temporary occupation by the Russian Federation of the Autonomous Republic of Crimea and the city of Sevastopol as a result of armed aggression against Ukraine, the Russian Federation was fully responsible for respect of human rights and implementation of the relevant treaties in the annexed and temporarily occupied territory of Ukraine.

75. Ukraine undertook to exercise the right of derogation in certain areas of the Donetsk and Luhansk regions of Ukraine that had been determined by the Anti-Terrorist Centre of the Security Service of Ukraine in connection with the anti-terrorist operation launched in April 2014. The derogation applies to articles 2 (3) and 9, 12, 14 and 17 of the International Covenant on Civil and Political Rights and to articles 5, 6, 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This measure is to last until the "complete cessation of the Russian Federation armed aggression", the restoration of constitutional order, and until further notification to the Secretary-General of the United Nations and the Secretary-General of the Council of Europe of the resumption of the application in full of the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.

76. The derogation was prompted by the adoption of laws diminishing some internationally protected rights and guarantees in order to respond to an "armed aggression". These include the following:

- On 12 August 2014, Parliament adopted the Law of Ukraine on Amendments to the Law of Ukraine on Combating Terrorism regarding the preventive detention of persons involved in terrorist activities in an anti-terrorist operation area for a period exceeding 72 hours.
- On 12 August 2014, Parliament adopted the Law of Ukraine on Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pretrial investigation under martial law, in a state of emergency or in an anti-terrorist operation area.
- On 12 August 2014, Parliament adopted the Law of Ukraine on Administering Justice and Conducting Criminal Proceedings in connection with an Anti-Terrorist Operation. On 3 February 2015, Parliament adopted the Law of Ukraine on Military and Civil Administrations. In accordance with the latter law, military and civil administrations were established as temporary State bodies functioning in the Donetsk and Luhansk regions, within the Anti-Terrorist Centre of the Security Service of Ukraine. They were granted powers to set limits on freedom of movement (curfew) and to conduct security searches, checks and other public safety measures.

[7] See the full derogation, available from https://treaties.un.org/doc/Publication/CN/2015/CN.416.2015-Eng.pdf (accessed 24 March 2016).

77. An additional notification of 27 November 2015 provided a list of localities in the Donetsk and Luhansk regions to which the derogation applied. All of these localities were under the partial or total control of the Government of Ukraine as at 1 October 2015. The derogation also reiterated that the Russian Federation was occupying and exercising effective control over certain areas of the Donetsk and Luhansk regions and that it was fully responsible for the respect and protection of human rights in those territories, under international humanitarian law and international human rights law.[3]

78. The Working Group urges the Government of Ukraine to reconsider the derogations with a view to assuming responsibility for the protection of the rights of the citizens of Ukraine. It reiterates the call by the human rights monitoring mission in Ukraine for the Government to take all possible measures to enhance protection for the population of Donetsk and Luhansk regions, including in areas under the control of the armed groups, as well as for those living in the Autonomous Republic of Crimea.

IX. Human rights violations and impunity

79. Ukraine continues to face enormous challenges in the respect, protection and fulfilment of human rights, as armed conflict in the country persists. As highlighted in the OHCHR report covering the period from 16 February to 15 May 2016,[4] despite the reduction in hostilities, the conflict in the east still affects people residing in the conflict zone and their enjoyment of human rights. The threat of re-escalation of hostilities remains, which gives rise to further concern about human rights violations, particularly as ceasefire violations are not always observed. The reported inflow of ammunition, weaponry and fighters from the Russian Federation to the territories controlled by armed groups further destabilizes the situation in the east and for the local population.

80. What has been a serious concern for the Working Group is the widespread impunity for gross violations that have taken place at the hands of foreign armed actors, allegedly on both sides of the conflict. To date, foreign fighters have been prosecuted by the Ukrainian authorities for various crimes including terrorist-related offences, but there have been no prosecutions in relation to human rights violations that have taken place.

81. The impact of the activities of foreign fighters on human rights, from actors on both sides of the conflict, includes alleged cases of extrajudicial and summary execution, torture, arbitrary detention, and infringement of the rights to freedom of movement and freedom of expression.

82. Concerns were expressed to the Working Group that the ad hoc development of battalions and armed groups, including those with foreigners in them, contributed to the absence of effective command and control of armed forces. This was identified as a factor in the escalation of hostilities and the expanded negative impact in terms of human rights violations, with large numbers of civilians among the victims.

83. The Working Group received reports of violations committed by the Aidar volunteer battalion in Luhansk region.[5] Among these were abductions, unlawful detentions, and acts of torture and ill-treatment, including of detainees, robberies, and possible executions, potentially amounting to war crimes. It is alleged that the volunteers abducted local men deemed to be collaborating with armed groups and held them in detention, beat them and

[3] See https://treaties.un.org/doc/Publication/CN/2015/CN.656.2015-Eng.pdf (accessed 24 March 2016).

[5] "Ukraine: abuses and war crimes by the Aidar volunteer battalion in the north Luhansk region", Amnesty International briefing, 8 September 2014, index number: EUR 50/040/2014. Available from https://www.amnesty.org/en/documents/EUR50/040/2014/en.

robbed them of their valuables. The Working Group was informed that there had been an investigation by the Office of the Military Prosecutor into the allegations against members of the Aidar battalion. Eleven members of the battalion had been indicted for intentional homicide or for illegal abduction or confinement of a person, and two other members were detained on 13 April 2016.

84. Despite the efforts by the Office of the Military Prosecutor in bringing perpetrators from volunteer battalions and the Armed Forces of Ukraine to justice, the level of impunity remains high. This is indeed the core preoccupation of the Working Group in relation to the visit. Impunity for the human rights violations committed by the range of foreigners in armed formations is widespread and seemingly unquestioned, paving the way for a murky zone with negligible accountability. The Working Group learned that there had never been any prosecutions for the specific crime of mercenarism in Ukraine. Additionally, some foreign fighters have been charged for indirect offences such as trespassing against the territorial integrity of Ukraine, participation in a terrorist group or organization, and participation in unlawful paramilitary or armed formations, with 97 citizens of the Russian Federation reportedly charged and three reportedly sentenced for related offences but not for the human rights violations committed.

85. The Working Group is also concerned about the consequences of the conflict and the activities of foreign fighters and mercenaries as regards economic, social and cultural rights. The delegation learned of difficulties with access to water and gas among civilians affected by the conflict in the east. Also, 1.8 million people[10] have been internally displaced within Ukraine due to the conflict, with some gradually returning to their homes in the areas controlled by the armed groups. Access to housing, land and property continues to be a major problem. Between November 2015 and February 2016, the human rights monitoring mission in Ukraine compiled information about hostilities and the mass looting of civilian homes instigated by Ukrainian armed forces in the village of Shyrokyne (23 km to the east of Mariupol). To date, the residents displaced have received very little information about the status of their homes.

86. Regarding freedom of movement, the delegation witnessed long queues at checkpoints to enter and leave Donetsk, which were working on the basis of procedures established by the relevant authorities. These delays were also brought about in part by the cessation of trade between Ukraine and the territories in the east under the control of the armed groups, as well as by the need for individuals to go to areas outside of the contact line to collect social benefits or simply to visit friends and relatives. The State Border Service recorded as many as 25,000 to 27,000 civilians crossing the contact line on a daily basis, passing through five transport corridors (as of May 2016): four in Donetsk region and one in Luhansk region, which have stretches of "no man's land" in between. Often, between 300 and 400 vehicles wait in the queue for miles on each side of the contact line, resulting in passengers spending nights in freezing temperatures without access to water or sanitation as they wait to pass to the other side of the conflict zone.

87. In addition, the Working Group learned that many non-governmental organizations, particularly in the east, and those critical of the actions of the Government and other actors in the conflict, had been forced to shut down or their members had been arrested or intimidated. Only one or two organizations were thus operational in the region at the time of the visit, for the purpose of undertaking humanitarian work.

[10] According to the Ministry of Social Policy of Ukraine, the number of registered internally displaced persons from the conflict-affected areas and the Autonomous Republic of Crimea reached 1,785,740 as at 6 June 2016.

88. The Working Group encourages consideration by the Government and all parties to the conflict of the full range of human rights impacts of the activities of foreign armed actors, with a view to preventing and addressing violations. Particular attention may be paid to negotiation between the two sides on ensuring the protection of human rights, notably for civilians.

X. Private military and security companies

89. The Working Group did not find significant data on private military companies. It was informed by government authorities that only private security companies operated in the country, not private military companies, and that the Ministry of Interior oversaw their activities. On another matter, only State security companies allowed for personnel to be armed.

90. A licensing regime regulates private security companies, and if there are any violations the licence is revoked, with criminal cases opened in respect of any crime committed. However, the operation of private military companies is currently prohibited.

91. The Working Group was informed of a Russian private military company that reportedly recruited fighters, including foreigners, for the conflict in Ukraine. When asked about reports coming from the self-proclaimed "Donetsk people's republic" or the self-proclaimed "Luhansk people's republic" about foreign private military companies, the Working Group was informed by the Ukrainian authorities that there was no precise information on the issue.

92. The Working Group strongly recommends regulation of the private military sector in the interest of preventing potential human rights violations. In this regard, it is encouraged by the request by the Security Service of Ukraine to cooperate with the Working Group in developing legislation on the activities of private military companies. The Working Group stands ready to render its support to this endeavour.

XI. Conclusions and recommendations

93. **At the time of the Working Group's visit, the human rights monitoring mission in Ukraine reported that between 16 November 2015 and 15 February 2016, 78 conflict-related civilian casualties in eastern Ukraine had been recorded. Although numbers of casualties have decreased from previous years, the threat to civilian lives remains, as continued inflows of weapons, fighters and heavy artillery provide resources and ammunition for the ongoing clashes along the contact line. Continued indiscriminate shelling and the presence of anti-personnel mines and explosive remnants of war expose civilians to constant threat of death or injury. Those who live in what is termed "no man's land" or the "grey zone", an area along the contact line, feel the most vulnerable to human rights violations. The contact line has physically, politically, socially and economically isolated civilians, impacting on all of their human rights.**

94. **The continued presence of foreign fighters with large numbers of heavy weapons and ammunition, facilitated by the ease of passage through the borders between Ukraine and the Russian Federation, continues to pose threats to any peaceful resolution to the conflict.**

95. **The Working Group urges the Government and all parties to the conflict to fulfil their obligations under international human rights law and ensure respect for all civil, political, economic, social and cultural rights related to the activities of foreigners in armed groups.**

96. **It recommends full implementation of the Minsk Protocol, particularly the immediate ceasefire provision, the release without delay of hostages and all persons unlawfully or arbitrarily detained, and the withdrawal of illegal and armed formations and military equipment, as well as of fighters and mercenaries from Ukraine.**

97. **The Working Group maintains that fulfilment of provision 7 of the Minsk Protocol, on the continuation of inclusive national dialogue, is fundamental to achieving sustained peace and security and eliminating the market for mercenaries as well as the human rights violations related to their activity and the activities of other foreign fighters.**

98. **The Working Group urges the Government and all parties to the conflict to refrain from indiscriminate shelling of populated areas, where civilians are at grave risks of death and injuries.**

99. **In moving forward towards full accountability for human rights violations by foreigners in armed groups in Ukraine, the Working Group urges advancing beyond recognition of the role of foreign combatants in the armed conflict, to addressing their impact. Concrete measures for monitoring, reporting, legislation and legal action will mean incremental achievement of justice for victims of violations, and erosion of the harmful culture of impunity for acts committed during the armed conflict.**

100. **To address the problem of impunity, investigation, prosecution and judicial proceedings should be further carried out against persons responsible for serious violations or abuses of international human rights law or international humanitarian law, including torture or other cruel, inhumane or degrading treatment or punishment, summary or arbitrary executions, or enforced or involuntary disappearances. Alleged mercenaries should be tried and convicted in accordance with article 447 of the Criminal Code of Ukraine.**

101. **The Working Group encourages enhanced mutual legal assistance regimes and extradition agreements with the countries of origin of the foreign fighters, to facilitate a greater exchange of evidence and information in order to better secure convictions for crimes committed in Ukraine.**

102. **Particular attention should be paid to effective border control, including at the border between the Russian Federation and Ukraine, and to monitoring the movement of armed personnel.**